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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 81.

JOSE ANTONIO FERNANDEZ Y PEREZ, PLAINTIFF IN ERROR,

vs.

JOSE PEREZ Y FERNANDEZ.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF PORTO RICO.

BRIEF FOR DEFENDANT IN ERROR.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 51.

JOSE ANTONIO FERNANDEZ Y PEREZ, PLAINTIFF IN ERROR,

vs.

JOSE PEREZ Y FERNANDEZ.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF PORTO RICO.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF CASE.

This action was brought by Jose Perez against Jose Antonio Fernandez to recover damages sustained by the former as the result of the wrongful suing out and levying of an attachment by the latter.

Both parties are subjects of the King of Spain, residing in Porto Rico.

Rafael Diaz Aguerria was also named in the declaration and the writ of summons as a party defendant, but he was

returned *non est* by the marshal. No appearance was at any time entered in his behalf, and the cause proceeded as though he had never been named in it.

Plaintiff Perez alleged that for several years prior to January 4, 1900, he had been doing a general commission business at Mayaguez, Porto Rico, under the style of Perez, Ramos and Company; that he was the owner of many valuable real properties on the island, and individually and as a member of the above firm he enjoyed, both at home and in foreign countries, a large credit, and was in good commercial standing; that the defendant Fernandez, "for himself and as attorney-in-fact and agent of Rafael Diaz Aguerria," on or about January 4, 1900, in the United States Provisional Court for the Department of Porto Rico, did "falsely and maliciously and without reasonable or probable cause make an affidavit for attachment against the goods and property of plaintiff," and "wrongfully, vexatiously, maliciously and without probable cause caused an attachment to issue against the store and warehouse and the lot upon which the same was situated," in which he was conducting his business in Mayaguez, and also against other property in Porto Rico, all being of great value; that the attachment was levied by the marshal upon the properties mentioned, "all of which exceeded in value many times the amount of the debt for the collection whereof the said attachment was sued out;" that the alleged grounds of the attachment did not exist and the defendant did not have probable cause to believe that they did exist; that said suit and attachment proceedings instituted by the defendant had been judicially investigated by the district court of the United States for Porto Rico (as successor to the United States Pro-

visional Court for the Department of Porto Rico) prior to the bringing of this suit, and determined against the defendant; that by reason of such wrongful acts plaintiff's credit was destroyed, his stock of goods disarranged and injured, and he was compelled to retire from said firm, and thereby to lose a large amount of money. Wherefore he brings this suit to recover $20,000, made up as follows:

Loss of profits during pendency of attachment suit	$3,500.00
Traveling expenses	500.00
Counsel fees	1,000.00
Injury to business and credit	15,000.00

(Pp. 1, 2, and 3.)

The defendant Fernandez was served personally with summons (p. 5) and demurred to the declaration on the ground that it appeared on its face that he, Fernandez, "was acting as the duly authorized agent of the said Rafael Aguerria, and was neither principal nor party plaintiff to the said action to recover fifteen thousand pesos against Jose Perez" (p. 6). The demurrer was overruled (p. 7). Thereupon defendant entered a plea of "Not guilty" and "put himself on the country" (p. 7).

Plaintiff joined issue (p. 8), and after trial had the jury returned a verdict "for the plaintiff (for) seven thousand dollars ($7,000.00) in damages" (p. 24).

Motion for a new trial was filed (p. 24) and overruled (p. 25), and judgment was entered on the verdict (p. 25).

Plaintiff, to sustain his demand, introduced in evidence the record of the proceedings in the attachment cases before the provisional court, and also gave in certain oral evidence

tending to show his long career as a business man in the community, his high commercial standing both at home and abroad, prior to the wrongful levying of the attachment, and his loss of credit and expenses incurred as the result of such levy.

No exception to the admissibility of any of this evidence was preserved of record.

Plaintiff having rested, the defendant moved for a *nonsuit*, which motion was overruled (p. 71); and thereupon the defendant "offered certain testimony to maintain the issues on his behalf, but as no error is assigned in regard thereto the same is not set forth" in the bill of exceptions (p. 71).

Both sides having rested, the court charged the jury at length, advising it that the action at bar was "an action for a malicious prosecution, for the malicious suing out of an attachment—that is, that it was done without proper cause and with malice." "The question is, whether there was probable cause for it and whether it was done through malice;" defined "probable cause," and charged that if there was "no probable cause for the attachment, the law presumes malice."

"I say to you, gentlemen, that if, at the time that attachment was sued out on the 2d day of January, 1900, this defendant in this case, Fernandez, had reasonable grounds to believe, from all the circumstances existing, and that have been proven to you, that there was reasonable cause to believe that this Spanish gentleman for whom he was acting would lose his debt unless he took such steps as he did take, and he had a right to take under the law, then he is

protected in this suit, and your verdict in that event would be for the defendant. If, upon the other hand, if you believe that he did not act in good faith; that it was in bad faith—judging from all the testimony and all the circumstances—that there were no grounds for a reasonable man to believe that that debt might be lost unless some action was taken, then I say to you that this defendant had no right to sue out that attachment, and, although he was only acting for another as agent, it is tort and a wrong for which he is responsible, as well as the man he acted for. If there is no reasonable cause to believe he had grounds for an attachment, the law presumes he did it maliciously. That view, however, is liable to be rebutted by all the circumstances and evidence in the case; and you must determine whether —not that there was actual cause for suing it out—but whether, under all the circumstances, he had reasonable grounds to think, as a reasonably prudent man, that there were grounds for suing it out. You are also to determine from the evidence whether that presumption of malice is rebutted by the circumstances in the case. The law creating and keeping in existence the provisional court provided that attachments may be sued out of it upon the grounds that I have read to you, and upon which the defendant did sue it out. It is really, at last, a matter for you to determine, under all the testimony, whether it was done in good faith—whether it was done honestly—and not whether the facts actually existed that authorized the suing out of the attachment, but whether there were reasonable grounds on the part of this defendant to believe that there were grounds for suing it out."

No exceptions of any kind were taken by either party to any portion of this charge.

The jury, having retired, returned its verdict as above.

Judgment was entered on the verdict as follows:

"Wherefore it is ordered and adjudged that plaintiff Jose Perez y Fernandez have and recover of Jose Fernandez y Perez the said sum of seven thousand dollars damages and his costs herein expended for which he shall have execution" (p. 25).

A writ of error from this court having been sued out, the plaintiff in error, defendant below, assigned errors as follows (p. 80):

1. The district court erred in overruling defendant's demurrer to plaintiff's declaration.

2. Said court erred in denying defendant's motion for a nonsuit, made by this defendant after plaintiff had introduced all his evidence in chief, *and before the offering of any testimony on behalf of defendant.*

3. The court erred in rendering a judgment against defendant alone, he having been sued jointly with another and no dismissal or *nonsuit* having been asked for or entered as to the other.

ARGUMENT.

The second and third assignments of error appear to have been abandoned, no argument in support of either appearing in the brief of plaintiff filed in this cause.

It is plain that defendant waived his motion for a *nonsuit* by introducing evidence in his own behalf after such motion had been overruled.

Bogk *vs.* Gassert, 149 U. S., 17, 23.
Union Pacific Railway *vs.* Daniels, 152 U. S., 684, 687.

That a verdict and judgment may be had against one of several defendants to the exclusion of the others in actions of tort is equally clear.

In such actions the liability of the defendants is joint and several. All persons liable, or any one or more of them, may be sued in the same action, and a recovery may be had against one or more or all of them in that action, or the plaintiff may, as he chooses, bring several actions against persons engaged in the same wrong-doing and may obtain several judgments for different amounts, but the acceptance of satisfaction of any one of the judgments will operate as a satisfaction of all.

Chaffee *vs.* U. S., 18 Wall., 516, 538.
Lovejoy *vs.* Murray, 3 Wall., 1, 10, 11.
Albright *vs.* McTighe, 49 Fed. Rep., 817, 820.
Cooley on Torts, 136.

The defendant Aguerria, though named in the declaration as a joint wrong-doer, was not served with process and took

no part in the progress of the case. The action being one of tort against several persons named as defendants, the plaintiff was entitled to recover against so many as the proof shows to have been guilty of the wrong.

Conner *vs.* Cockerill, 4 Cranch (C. C.), 3.

Milne *vs.* Huber, 3 McLean, 212.

"The rule undoubtedly is that where a verdict for damages for tort is rendered against one defendant only, judgment may be rendered thereon although other persons may have been joined as defendants under an averment that the tort was committed by all the defendants jointly."

Boswell *vs.* Gates, 56 Iowa, 143.

Jones *vs.* Grimmet, 4 W. Va., 104.

The verdict and judgment against one amounts to a dismissal of the cause as to the others.

Davis *vs.* Taylor, 41 Ill., 405.

JURISDICTION.

The first assignment of error is possibly broad enough to afford foundation for the argument as to want of jurisdiction in the United States district court for Porto Rico to entertain this cause, though it is to be noted that the ground of demurrer specifically assigned at the time of filing the demurrer itself was not related in any manner to jurisdiction or lack of it on the part of the court.

As the objection to the exercise of jurisdiction by the district court is based on the character of the subject-matter, and as in such respect the jurisdiction of courts cannot be enlarged by the assent of parties, express or implied, it would

seem that it is not too late to raise the objection for the first time here on appeal.

As stated by plaintiff in error, the point presented to the court is—

"that the lower court in entertaining this form of action and in hearing and deciding the issues between the parties in accordance with the principles of the common law of England and in disregard of the local laws, pleading and practice, then in force, was exercising a jurisdiction that did not belong to it, and the judgment rendered was therefore void and should be set aside."

It is asserted that an action to recover damages for personal injuries or for the wrongful or malicious injury wrought by one to the credit, business, or reputation of another is unknown to the Spanish civil law as administered in Porto Rico prior to American occupation, and that neither by statutory enactment nor by municipal or other regulation has the right to maintain such an action since been accorded to its inhabitants.

Objection is also made to the fact that the United States district court for Porto Rico in administering this cause adhered to the forms of practice and procedure established in and pertaining to Federal courts sitting in the United States.

If the objection of want of jurisdiction in the trial court be not well taken, it is certain that the objection to the forms of procedure to which litigants before its bar may be required to conform is without substance. If the former objection be well taken, the latter becomes immaterial.

By section 33 of the act of April 12, 1900 (31 Stats. L., 77; Supl. R. S., vol. 2, p. 1128), commonly called the Foraker act, the judicial power is

"vested in the courts and tribunals of Porto Rico as already established and now in operation including municipal courts, under and by virtue of general orders numbered one hundred and eighteen as promulgated by Brigadier General Davis, United States volunteers, August sixteenth eighteen hundred and ninety-nine and including also the police courts established by general orders numbered one hundred and ninety-five &c. * * * and the laws and ordinances of Porto Rico and the municipalities thereof in force, so far as the same are not in conflict herewith, all of which courts and tribunals are hereby continued. The jurisdiction of said courts and the form of procedure in them, and the various officials and attachés thereof, respectively, shall be the same as defined and prescribed in and by said laws and ordinances and said general orders numbered one hundred and eighteen and one hundred and ninety-five, until otherwise provided by law."

By section 34 of said act Porto Rico is constituted a judicial district, and the district court of the United States for Porto Rico is provided for. In addition to the ordinary jurisdiction of district courts of the United States, this court is clothed with

"jurisdiction of all cases cognizant in the circuit courts of the United States" and is required to "proceed therein in the same manner as a circuit court."

"The laws of the United States relating to appeals, writs of error and certiorari, removal of causes, and other matters and proceedings as between the courts of the United States and courts of the several States shall govern in such matters and proceedings as between the district court of the United States and the courts of Porto Rico" * * *

"The United States district court hereby established shall be the successor to the United States provisional court established by general orders numbered eighty-eight, promulgated by Brigadier General Davis, United States volunteers, and

shall take possession of all records of that court, and take jurisdiction of all cases and proceedings pending therein, and said United States provisional court is hereby discontinued."

By section 35 of said act provision is made for writs of error and appeals from final decisions of the supreme court of Porto Rico and the district court of the United States to the Supreme Court of the United States "in the same manner and under the same regulations and in the same cases as from the supreme courts of the Territories of the United States," and it is also provided that—

"such writs of error and appeal shall be allowed in all cases where the Constitution of the United States, or a treaty thereof, or an act of Congress is brought in question and the right claimed thereunder is denied; and the supreme and district courts of Porto Rico and the respective judges thereof may grant writs of *habeas corpus* in all cases in which the same are grantable by the judges of the district and circuit courts of the United States."

Section 8 of said act declares

"That the laws and ordinances of Porto Rico now in force shall continue in full force and effect, except as altered, amended, or modified hereinafter, *or as altered or modified by military orders and decrees in force when this act shall take effect*, and so far as the same are not inconsistent or in conflict with the statutory laws of the United States not locally inapplicable, or the provisions hereof, until altered, amended or repealed by the legislative authority hereinafter provided for Porto Rico or by act of Congress of the United States."

The Civil Code in force in Porto Rico at the date of institution of this suit (War Department translation, Division of Insular Affairs, Oct., 1899), under Title XVI, "Obligations contracted without agreement," makes provision in "chapter first" for actions founded on "Quasi contracts," such as

those which (section 1) arise out of the management of another's business, and (section 2) out of the collection of what is not due. Chapter second of the same title is devoted to "Obligations which arise from fault or negligence."

Under the latter head the following provisions are interesting:

"Art. 1902. A person who by an act or omission causes damage to another when there is fault or negligence shall be obliged to repair the damage so done.

Art. 1903. The obligation imposed by the preceding article is demandable, not only for personal acts and omissions, but also for those of the persons for whom they should be responsible.

The father, and on his death or incapacity the mother, is liable for the damages caused by the minors who live with them.

Guardians are liable for the damages caused by minors or incapacitated persons who are under their authority and live with them.

Owners or directors of an establishment or enterprise are equally liable for the damages caused by their employees in the service of the branches in which the latter may be employed or on account of their duties.

The State is liable in this sense when it acts through a special agent, but not when the damage should have been caused by the official to whom properly it pertained to do the act performed, in which case the provisions of the preceding article shall be applicable.

Finally, masters or directors of arts and trades are liable for the damages caused by their pupils or apprentices while they are under their custody.

The liability referred to in this article shall cease when the persons mentioned therein prove that they employed all the diligence of a good father of a family to avoid the damage.

Art. 1904. A person who pays for the damage caused by his employees may recover from the latter what he may have paid.

Art. 1905. The possessor of an animal, or the one who uses the same, is liable for the damages it may cause, even when said animal should escape from him or stray.

This liability shall cease only in case the damage should arise from *force majeure* or from the fault of the person who may have suffered it.

Art. 1906. The owner of a game preserve shall be liable for the damage caused by the game to the neighboring estates, should he not have done what may have been necessary to avoid the increase of the same or should he have hindered the efforts of the owners of said estates to hunt.

Art. 1907. The owner of a building is liable for the damages which may result from the collapse of the whole or a part thereof, if it should occur through the absence of the necessary repairs.

Art. 1908. The owners shall also be liable for the damages caused—

1. By the explosion of machines which may not have been cared for with due diligence, and for kindling of explosive substances, which may not have been placed in a safe and proper place.

2. By excessive smoke, which may be noxious to persons or properties.

3. By the fall of trees, located in places of transit, when not caused by *force majeure*.

4. By the emanations of sewers or deposits of infectious matters, when constructed without precautions proper for the place where they are located.

Art 1909. Should the damages referred to in the two preceding articles arise from defects in construction, the third person who suffers it may only claim damages of the architect, or, in a proper case, of the constructor, within the legal period.

Art. 1910. The head of a family who dwells in a house, or in a part of the same, is liable for the damages caused by the things which may be thrown or which may fall therefrom."

The word "repair," appearing in article 1902 above, is defined by the Century Dictionary as follows:

"2. To make amends for, as for an injury, by an equivalent; to give indemnity for; make good; as, to repair a loss or damage."

It is more definite and positive than, though of same import as, the word "liable," appearing in the subsequent articles.

There is no indication from the chapter itself or any of its articles that the reparation to be made or the liability imposed is limited to cases where "the injury done is of a material character, capable of being definitely valued," as when a wagon or suit of clothes or other property on the person may be destroyed.

Nor is there any suggestion that the beneficent effects of the chapter are only to be invoked in connection with or as an incident to a criminal proceeding.

That an injury to a man's person through negligence, or to his reputation or credit through malice, constitutes a wrong is not to be doubted. That the Spanish Civil Code intended to recognize the possibility of such a wrong and to provide a remedy by which it should be redressed seems equally certain.

The contrary seems not to have occurred to either of the parties to this action or to their attorneys, in the course of the trial in the district court below.

Title VII, article 902 *et seq.*, of the Law of Civil Procedure for Cuba and Porto Rico, provides for the bringing of an action to establish civil liability of judges and associate justices "when, in the discharge of their duties, they violate the law through inexcusable negligence or ignorance."

Title XIV, article 1395, of the same Code, declares it to "be the duty of the judges of first instance to order pro-

visional seizures when requested, for the purpose of insuring the payment of a debt exceeding 1,000 pesetas."

Article 1399 defines the procedure to be pursued under certain circumstances, and declares that if the title presented should be other than one by virtue of which an execution can be ordered without further proceedings, the attachment shall "be ordered for the account and at the risk of the person requesting it."

Article 1400 of the same Code provides that—

"In the cases mentioned * * * if the person requesting the attachment should not be of well-known responsibility, the judge shall require him to furnish security sufficient to answer for the damages and costs which may be suffered or incurred.

"This security may be of any of the kinds allowed by law; but if the judge should allow a personal bond, he shall do so under his liability."

It thus appears that the civil law, as existing in Porto Rico, conclusively presumes that the person demanding a writ of attachment shall be liable to make good all damages and costs occasioned by its issuance. To this end the attaching creditor may be required to give a bond or other security; but if such be not taken, or when taken proves to be worthless, it seems that the injured party still has his right to proceed against the wrongdoer under article 1902 *supra*; otherwise there would be a wrong without a remedy, a condition as well obnoxious to the civil law of Spain as to the common law of England.

If the insular courts had jurisdiction to try cases of such character, it is certain that, given the requisite alienage of parties, the District Court of the United States for Porto Rico had jurisdiction of this cause.

The jurisdiction of the United States provisional court for the department of Porto Rico, of which court the present district court for Porto Rico is the successor, was defined by general orders No. 88, which is in part as follows:

General Orders, }
No. 88. }

HEADQUARTERS DEPARTMENT PUERTO RICO,
SAN JUAN, *June* 27, 1899.

I. In view of existing and steadily increasing legal business requiring judicial determination, which does not fall within the jurisdiction of the local insular courts, such as smuggling goods in evasion of revenue laws, larceny of United States property, controversies between citizens of different States and of foreign States, violation of the United States postal laws, etc., and pursuant to authority from the President of the United States, conveyed by indorsement of April 14, 1899, from the Acting Secretary of War, and after full conference with the supreme court and members of the bar of the island, a United States provisional court is hereby established for the department of Puerto Rico.

II. The judicial power of the provisional court hereby established shall extend to all cases which would be properly cognizable by the circuit or district courts of the United States under the Constitution, and to all common-law offenses within the restrictions hereinafter specified.

III. Art. III, sec. 2, paragraph 1, of the Constitution is as follows:

1. "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects."

IV. The decisions of said court shall follow the principles of common law and equity as established by the courts of the United States, and its procedure, rules, and records shall conform as nearly as practicable to those observed and kept in said Federal courts. Its terms and places of sitting shall be fixed by the court at such times and places as may be most convenient for the parties litigant and to insure the expeditious transaction of business.

V. * * * The jury system may be introduced or dispensed with in any particular case, in the discretion of the court.

VI. The judges of the provisional court shall be clothed with the powers vested in the judges of the circuit or district courts of the United States.

* * * * * * *

VIII. In order to define more clearly certain branches of the criminal jurisdiction of the provisional court, it is hereby provided that it shall include and be exclusive in the following classes of cases:

* * * * * * *

Fourth. Offenses committed by or against foreigners, or by or against citizens of another State, district or Territory of the United States residing in this department.

* * * * * * *

X. In civil actions when the amount in controversy is $50 or over, and in which any of the classes of persons above enumerated in paragraph VIII are parties, or in which the parties litigant by stipulation invoke its jurisdiction, shall be brought in the provisional court: *Provided*, That in the determination of all suits to which Puerto Ricans are parties, or of suits arising from contracts which have been or shall be made under the provisions of Spanish or Puerto Rican laws, the court shall, as far as practicable, conform to the precedents and decisions of the United States courts in similar cases which have been tried and determined in territory formerly acquired by the United States from Spain or Mexico. In all other civil actions the case shall lie within the jurisdiction of the proper insular court as now provided by local law.

Report of Brig. Gen. Geo. W. Davis, U. S. V., on Civil Affairs of Puerto Rico, 1899, pages 117–118.

The provisional court was abolished by the Foraker act, but all alterations and modifications made in the laws and ordinances of Porto Rico by any "military orders and decrees in force when" that act took effect continued thereafter except as modified by Congress or the local legislature.

It is submitted that the district court of Porto Rico had jurisdiction of this action, and that no error occurred in the course of its administration.

The judgment of the United States district court for Porto Rico should be affirmed.

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FREDERIC D. MCKENNEY,
Attorneys for Defendant in Error.

WAYNE MACVEAGH,
Of Counsel.

[redacted] COURT OF THE [redacted] STATES.

October Term, 1916.

No. 1.

JOSÉ ANTONIO FERNANDEZ Y PEREZ, Plaintiff in Error,

vs.

JOSÉ PEREZ Y FERNANDEZ.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW MEXICO.

ABBREVIATED BRIEF FOR DEFENDANT IN ERROR PURSUANT TO DIRECTION OF THE COURT.

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Byron S. Adams Printing Co. (Inc.), Printers, Washington, D. C. 1916

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 1.

JOSE ANTONIO FERNANDEZ Y PEREZ, PLAINTIFF IN ERROR,

vs.

JOSE PEREZ Y FERNANDEZ.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF PORTO RICO.

Additional Brief for Defendant in Error Filed by Direction of the Court.

I.

Can this court, on the record of this case, properly consider and determine the contention of plaintiff in error that a civil action like the present one was at the date of the attachment and the commencement of this action unknown to and unauthorized by the laws and jurisprudence of Porto Rico?

This action was instituted November 18, 1901, in the district court of the United States for the district of Porto Rico by plaintiff, Perez, who complained that *his business* and

credit as a merchant had been destroyed and his property and stock of goods had been greatly depreciated in value by the wrongful and malicious acts of the defendant, Fernandez.

The acts particularly complained of were that Fernandez, claiming to be acting as the attorney in fact and agent of one Rafael Diaz Aguerria, on or about the 4th day of January, 1900, in the United States provisional court for the department of Porto Rico, maliciously caused to be instituted in the name of said Aguerria a suit against said plaintiff, Perez, for 15,000 pesos, Porto Rican currency, and falsely and maliciously and without probable cause made and filed in said suit certain affidavits, upon the strength of which he caused an attachment to issue against plaintiff's store and warehouse, wherein the latter was conducting his business as a general commission merchant, and also against other property belonging to plaintiff, all situated in the island of Porto Rico, the aggregate value whereof was greatly in excess of the amount of the alleged debt. The attachment so caused to be issued by said Fernandez was levied upon said properties by the marshal of said United States provisional court, but thereafter, on or about the 4th day of June, 1901, the plaintiff's suit and the attachment proceedings connected therewith were by the district court of the United States for the district of Porto Rico determined against said Aguerria and in favor of the plaintiff herein, Perez, who now claims damages for the wrongs so suffered by him (R., 2–3).

To this declaration the defendant, Fernandez, interposed a general demurrer, expressly based upon the ground that it appeared upon the face of said declaration "that defendant, Jose Antonio Fernandez y Perez, was acting as the duly authorized agent of the said Rafael Aguerria, and *was neither principal nor party plaintiff to the said action to recover fifteen thousand (15,000) pesos against Jose Perez y Fernandez*" (R., 6).

This demurrer was overruled by the court (R., 7), and no exception to such action on the part of the court was taken by defendant. Afterwards defendant filed a plea of not guilty and put himself upon the country (R., 7), and issue having been joined on part of the plaintiff (R., 8) a jury was duly empaneled and sworn without objection by either party (R., 9).

On the trial plaintiff, Perez, introduced in evidence the record in the case of Rafael Diaz Aguerria, executor of Claudio Barro against Jose Perez y Fernandez (R., 30, *et seq.*), being the suit referred to in plaintiff's declaration herein, which contained, among other things, the affidavits of Fernandez (R., 31, 34) herein complained of, and showed the levying of a writ of attachment upon plaintiff's property (R., 33), and the subsequent dismissal of said case at the plaintiff Aguerria's cost on motion of the attorney for said Perez by the United States district court for the district of Porto Rico (R., 36), which court was by law the successor of the United States provisional court aforesaid, and had possession of all of the records of said court and jurisdiction of all cases and proceedings pending therein (act April 12, 1900, § 34).

Perez also introduced in evidence a certain decree of said United States district court for the district of Porto Rico, entered in the equity case of Jacinto Perez Barro *vs.* Rafael Diaz Aguerria and Jose Perez y Fernandez, perpetually enjoining said Rafael Diaz Aguerria, as foreign executor of Claudio Barro, from proceeding further, either in person or by agent or attorney, in the cause then pending against said Perez as aforesaid, and also certain oral testimony tending to show plaintiff's standing and credit at home and abroad as a merchant and the extent to which his business and his credit had suffered as the result of the malicious action of the defendant, Fernandez, in bringing about the institution of said attachment proceedings and securing the

levy of the writ of attachment issued in the course of said cause.

In the course of such evidence a witness, Jacinto Perez, being under examination, the following colloquy occurred:

Mr. DEXTER for plaintiff: "Q. State whether or not, if you know of your own knowledge, whether or not you or any of the heirs of Claudio Barros authorized Mr. Fernandez to institute any attachment suit against Mr. Perez?"

Mr. CORNWELL for defendant: "I object to that as Mr. Fernandez never instituted any attachment proceeding in the court; it was in the name of somebody else."

The COURT: "I do not think that question is proper. Suit was brought in the name of Agueria, executor, and the court ruled that a foreign executor, without first complying with certain conditions could not sue here."

Mr. DEXTER: "I propose to show by this witness that the proper parties, the heirs, the three heirs of Claudio Barros, that none of these people authorized this defendant here to institute such an attachment proceeding."

The COURT: "The record shows that this man was an executor in Spain * * * and that this suit was brought in his name. I take it that if the man believed in good faith—the defendant here— * * * and did not act maliciously, and for proper cause brought the suit in the name of the executor who was in Spain, and believed he had a right to bring it, it seems to me that is not malicious persecution" (R., 69).

Mr. DEXTER: "Q. Do you know of your own knowledge, whether the defendant in this case, Mr. Fernandez, represented the executor of Claudio Barros?"

The WITNESS: "A. According to what Mr. Fernandez told me, he had received a power from Mr. Aguerria, who was the executor of Claudio Barros" (R., 70).

The plaintiff having rested, the defendant introduced evidence in his own behalf, and the court having charged the jury, the latter returned a verdict for plaintiff in the sum of $7,000. A motion for a new trial having been overruled by the court (R., 24), judgment was entered upon said verdict in favor of the plaintiff, Perez, against the defendant, Fernandez (R., 25).

It will be noted that the defendant here, Fernandez, was not a party to the record in the attachment proceedings. He appeared therein not as a party plaintiff, but as an affidavit maker, asserting, among other things, that he held the power of attorney of the plaintiff named in said suit, viz: Rafael Diaz Aguerria, the executor of Claudio Barro, "and that Rafael Diaz Aguerria has a good cause of action therein," and that affiant has good reason to believe that the defendant (Perez) intends to and will fraudulently part with or conceal his property before judgment can be recovered against him, so that said judgment cannot be satisfied out of said property (R., 31).

By a second affidavit subsequently filed in the same cause, for the purpose of procuring the immediate issuance of the writ of attachment, said Fernandez further swore that said Perez was about to fraudulently conceal, dispose of, or mortgage his property so as to hinder or delay his creditors (R., 32).

Upon the question of defendant's liability in the pending suit the trial court charged the jury as follows:

"I say to you, gentlemen, that if, at the time that attachment was sued out on the 2d day of January, 1900, this defendant in this case, Fernandez, had reasonable grounds to believe, from all the circumstances existing, and that have been proven to you, that there was reasonable cause to believe that this Spanish gentleman for whom he was acting would lose his debt unless he took such steps as he did take, and he had a right to take under the law, then he is protected in this suit, and your verdict in that event would be for the defendant. If, upon the other hand, if you believe that he did not act in good faith; that it was in bad faith—judging from all the testimony and all the circumstances—that there were no grounds for a reasonable man to believe that that debt might be lost unless some action was taken, then I say to you that this defendant had no right to sue out that attachment, and, although he was only acting for another as agent, it is tort and a wrong for

which he is responsible, as well as the man he acted for. If there is no reasonable cause to believe he had grounds for an attachment, the law presumes he did it maliciously. That view, however, is liable to be rebutted by all the circumstances and evidence in the case; and you must determine whether—not that there was actual cause for suing it out—but whether, under all the circumstances, he had reasonable grounds to think, as a reasonably prudent man, that there were grounds for suing it out. You are also to determine from the evidence whether that presumption of malice is rebutted by the circumstances in the case. The law creating and keeping in existence the provisional court provided that attachments may be sued out of it upon the grounds that I have read to you, and upon which the defendant did sue it out. It is really, at last, a matter for you to determine, under all the testimony, whether it was done in good faith—whether it was done honestly—and not whether the facts actually existed that authorized the suing out of the attachment, but whether there were reasonable grounds on the part of this defendant to believe that there were grounds for suing it out."

No objection to the jurisdiction of the trial court nor any objection whatever to the charge of the court to the jury was interposed by either party.

Unless want of jurisdiction in the trial court by reason of the subject-matter of the controversy appears from the face of the record, it would seem that the judgment under review must be sustained.

"Jurisdiction of the subject-matter is power to adjudge concerning the general question involved, and is not dependent upon the state of facts which may appear in a particular case arising, or which is claimed to have arisen, under that general question, * * * there is a more general meaning to the phrase 'subject-matter' in this connection, than power to act upon a particular state of facts. It is the power to act upon the general, and, so to speak, the abstract question, and to determine and adjudge whether the particular facts presented call for the exercise of the abstract power."

Hunt *vs.* Hunt, 72 New York, 225.

What jurisdiction, if any, then, did the district court of the United States for the district of Porto Rico have at the time of the institution of this suit over actions of tort brought to recover damages for injury to one's business or credit suffered through the fault (*culpa*) of another?

It is asserted by counsel for plaintiff in error that an action to recover damages for personal injuries or for the wrongful or malicious injury wrought by one to the credit, business, or reputation of another is unknown to the Spanish civil law as administered in Porto Rico prior to American occupation, and that neither by statutory enactment nor by municipal or other regulation has the right to maintain such an action since been accorded to its inhabitants.

It is also said by the same learned counsel that

"the subject-matter of the action brought against the plaintiff in error * * * involved a claim that could not have been enforced against him under the local law. The lower court not only assumed jurisdiction in an action that was not authorized by law but it gave the defendant in error a remedy that did not exist under the law. In other words, it exercised a jurisdiction that did not belong to it."

The question thus presented is one of power in the trial court to act judicially upon the subject-matter in suit, and it may be conceded for the purposes of this argument that upon the record of the cause this court can properly consider and determine the contention of plaintiff in error that a civil action like the present one was at the date of the attachment and the commencement of this action unknown to and unauthorized by the laws and jurisprudence of Porto Rico (United States *vs.* Perot, 98 U. S., 428; United States *vs.* Chaves, 159 U. S., 459). This brings us to the immediate consideration of the second inquiry propounded by this court, which is as follows:

Was a civil action like the present one known to the laws and jurisprudence of Porto Rico at the time the attachment in question was sued out?

It might perhaps serve to advance the argument somewhat if this inquiry should be extended by reference to cover the time of the institution of the pending action, for if a civil action like the present one was known to the laws and jurisprudence of Porto Rico at the time when the action was commenced in the district court for Porto Rico the prior existence of such a right of action at the time the attachment was sued out either follows as of course or, for reasons which will hereafter be made to appear, becomes of no moment.

Civil actions for the recovery of damages for injuries to persons and property caused by the fault or negligence of another have been recognized both by the Roman and by the civil law from early times. Such actions have been administered in the Peninsula since the establishment of the Spanish monarchy, and have always occupied an important place in the jurisprudence of that nation. Such actions were countenanced in the Law of the Twelve Tables and in the Justinian Codes, upon which the Spanish system of laws was largely founded.

It matters not by what name an action shall be christened, whether by the attorneys who brought it or the judge who tried it, for the jurisdictional power of the court searches out the substance of the matter in dispute, irrespective of whether it be dubbed in English "trespass on the case for wrongful attachment" or styled in Spanish "indemnizacion de daños y perjuicios."

The body of laws called "Las Siete Partidas" were in force in Porto Rico until 1889, when by royal decree the Civil Code since in force was extended to that province. The Code of Civil Procedure, likewise so extended, became effective in said province January 1, 1886.

Law I of Las Siete Partidas (tit. XV, part 7) declares that damage is the loss of or detriment to one's property or person caused by the fault of another.

Law III of the same part declares that damages may be recovered from the tort feasor or from the one whose fault caused the damage; also from the person who ordered or advised the commission thereof.

The Civil Code, which superseded the Partidas, though preserving the general features of the former legislation, gives much evidence of having been influenced both in its form and principles by the Code Napoleon. For example, article 1902 of the Civil Code, which directly pertains to this discussion, reads:

"He who, by an act or omission, causes damage to another, fault (*culpa*) or negligence intervening, shall be obliged to repair the damage so done,"

while the corresponding articles of the Code Napoleon read as follows:

"Art. 1382. Every act whatever of man which causes damage to another obligates him by whose fault it has happened to make reparation.

"Art. 1383. Every person is responsible for the damage which he causes not only by his act, but also by his negligence or by his imprudence."

Similar provisions are also to be found in the Civil Codes of

Belgium, articles 1382 and 1383;
Netherlands, articles 1401 and 1402;
Austria, article 1295;
Switzerland, canton of Vaud, articles 1037 and 1038;
Chile, article 2314;
Guatemala, articles 2276 and 2277;
Uruguay, article 1280;
Argentina, article 1109.
Louisiana.

Speaking generally, it may be said that wherever the civil-law system prevails practically identical provisions will be found, for all civil-law codes find a common origin in the Law of the Twelve Tables and the Justinian Codes.

Upon the articles above mentioned many commentators have shed light both as to their scope and meaning.

Don Leon Bonel y Sanchez, in his Codigo Civil Español, vol. IV, p. 894 *et seq*, referring to article 1902 of the Spanish Code, says (as translated):

"We ought to recognize the fact that the article upon which we are commenting involves a true maxim of universal jurisprudence. It has as a basis the principle of eternal justice, 'sua cuique culpa nocet,'—the fault must not prejudice any one but its doer. The wrongdoer is obliged to repair any damage whatever which he may have occasioned to a third person through fault or negligence. The law may not have considered his act as amounting to a crime or misdemeanor and may not have established its punishment in the penal code. Therefore, the scope and scale of fault and negligence are so broad that all the cases cannot be comprehended in the provisions of a positive law, however casuistical it may be. The best way to reach good decisions in every case is to attend to the particular circumstances of the persons and facts."

And Toullier, in Le Droit Civil Français, volume 6, says (p. 94):

"121. Les acts nuisibles aux droits d'autrui sont naturellement divisés en deux grandes classes, qui les comprennent tous, sans exception:

"Attentats à la personne ou aux droits personnels d'autrui;

"Attentats à sa propriété ou à ses droits réels.

"La première class comprend toutes les atteintes à la sureté, à la liberté, à la réputation, ou à l'honneur des personnes, à l'exercise de leurs droits personnels.

"La seconde comprend tous les attentats contre la propriété ou les bieus d'autrui, lorsqu'on les dévaste ou détériore, lorsqu'on le prive de sa jouissance ou de sa possession, lorsqu'on attente à ses droits réels, lorsqu'on l'empêche d'en acquérir."

(Injurious acts to the rights of third persons are naturally divided into two great classes which embrace all of them without any exception:

Outrages against the person or the personal rights of another;

Outrages against another's right of ownership or another's real property rights.

The first class comprehends all of the violations of the security, *liberty, reputation, or honor of persons*, or of the exercise of the individual rights.

The second one involves all of the breaches against the right of ownership or property of another, when one destroys or damages the property of another, when one deprives the owner of its enjoyment or possession, when one invades another's real property rights, or when one hinders or prevents another from acquiring same.)

Notwithstanding the scholarly argument of counsel for plaintiff in error to the effect that the Spanish law makes (practically) no provision for the redress of wrongs by civil action as opposed to criminal prosecutions, we venture the assertion that the administration of the civil law in Spain and her dependencies in this regard did not at the time of the institution of this suit greatly differ from that administered in other civil-law countries, and apart from methods of procedure did not greatly differ from that in vogue in common-law countries.

In the administration of civil law generally there is a well-recognized distinction between the word "délit" (a wrong) when used in connection with civil and as used in criminal complaints.

Thus Aubry and Rau, under the title "Des Délits," explain the point (Cours de Droit Civil Français, vol. 4, § 443):

"Le mot *délit* a, en droit civil, une signification différente decelle dans laquelle il se prend en droit criminel. En

droit civil, il désigne toute action illicite par laquelle une personne lèse sciemment et méchamment les droits d'autrui. En droit criminel, il désigne toute infraction définie et punie par la loi pénale.

"Les délits civils ne constituent pas tous des délits de droit criminel; car la loi pénale n'incrimine pas tous les actes que portent atteinte aux droits d'autrui" (p. 745).

(The word delit (wrong or tort) has in civil law a different meaning from that which it has in criminal law. In civil law it means every illicit action by which a person knowingly and maliciously damages the rights of another. In criminal law it denotes all of the breaches defined and punished by the penal code. All civil wrongs do not constitute criminal wrongs (misdemeanors or crimes), for the penal law does not render criminal all acts which injure the rights of others.)

Citing the following example:

"Le stellionat n'est pas incriminé par la loi pénale quoiqu'il soit, en certain cas, un véritable délit civil."

(Fraud (false representation) is not denounced by the penal law, although in certain cases it may constitute a true civil wrong.)

And so the same commentators, in § 445 of their work, under the subtitle "De l'obligation de réparer le dommage occasionné par un délit," say (p. 748):

"Tout délit engendre l'obligation de réparer le dommage qui en est résulté pour autrui."

(Every wrong gives rise to an obligation to repair the damage which results from it to another.)

And again they say (p. 749):

"L'obligation de réparer le dommage causé par un délit pèse solidairement sur tous ceux qui y ont participé, comme auteurs principaux ou comme complices, lors même qu'il

s'agit d'un fait qui n'est pas incriminé par la loi pénale. Il en résulte que l'action en réparation d'un délit répréhensible à plusieurs personnes, peut être intentée contre l'une d'elles seulement.

"La réparation du dommage, soit matériel, soit moral, causé par un délit, se résout en une indemnité pécuniaire, sauf, en outre, s'il y a lieu, la restitution de l'object qui a fait la matière du délit. La fixation du montant de cette indemnité est, en général, abandonée à l'arbitrage des tribunaux."

(The obligation of repairing the damage caused by a tort rests jointly and severally upon all the wrongdoers whether principals or accessories, notwithstanding the fact that the thing done may not have been punishable by the penal law. Therefore, a recovery upon a tort attributable to several persons may be had against one of them only. The recovery for damages caused by a wrong whether the damages be material or moral, shall be settled by a money indemnity, without excluding in addition thereto (besides) if it be possible, the restitution of the object which was the matter of the wrong. The amount of the recovery is in general left to the judgment of the courts.)

In a note to the above the following occurs:

"Il en est ainsi, lors même que le dommage causé par un délit, ne constitue qu'un tort purement moral. Notre droit n'admet, en général, d'autre réparation qu'une indemnité pécuniaire. Ainsi, le juge ne peut, même au cas de délit d'injures, ordonner ce qu'on appelle une réparation d'honneur, a moins que la loi ne l'y autorise formellement" (p. 749).

(So it is, even when the damage caused by a wrong only constitutes a *purely moral injury*. Our law does not generally admit of any other reparation than a pecuniary one. Thus a judge in a case of abusive language (slander) is not able to order the making of an apology unless the law formally authorizes it.)

So M. Laurent, in Cours Elémentaire de Droit Civil, volume 3, observes (p. 207) :

"Suffit-il que le dommage soit moral? Oui, la loi est conçue dans les termes les plus généreaux, et la tradition est en ce sens. L'esprit de la loi ne laisse aucun doute, elle veut sauvegarder tous les droits de l'homme, tous ses biens; or, notre honneur, notre considération ne sento-ils pas le plus précieux des biens? Les Tribunaux prononcent tous les jours des dommages-intérêts pour délit de calomnie, commis par la voie de la presse, bien que le dommage soit purement moral."

(Is it sufficient that the injury (suffered) be a moral one? Yes, for the law is expressed in the most general terms and its construction should be in such manner. The spirit of the law permits of no doubt, it purports to safeguard all the rights of man, all of his possessions; now, our honor, our reputation, is it not the most precious of our possessions? The courts every day award damages for slander committed by the voice of the press, though the injury suffered be a purely moral one.)

In the light of such commentaries, even if the Jurisprudencia Civil should be barren of cases or decisions on the precise point, would it be difficult to maintain the jurisdictional power on the part of the Spanish tribunals to entertain actions to recover damages in cases arising from acts either of commission or omission, irrespective of whether the injury complained of was to the reputation, social or commercial, of the complainant or to his property or "bienes" alone?

We are not, however, required to rely solely upon the commentators for a definition as to the true scope and proper application of these articles and the prior laws which they superseded, for the "Jurisprudencia Civil" contains many decisions upon the matter.

For example, in the case of Leonardo García de Castro *versus* The "Compañía de los Ferrocarriles Andaluces,"

decided by the supreme court of Madrid on June 27, 1894, it was held that the plaintiff, who was injured by one of the trains of the defendant company by reason of the negligence of the latter, was entitled to recover damages for the injuries caused to his health, moral condition, business, and interest.

Official Gazette of Madrid, November 8, 1894, p. 220.
Jurisprudencia Codigo Civil, by V. A. M., &c., vol. 2, pp. 542, 547.

In the case of Doña Juana Alonzo de Lara *versus* Don Manuel Chacón *et al.*, decided by the same court December 14, 1894, it was held that the plaintiff had a right of action under said section 1902 for damages for the death of her husband, who was an employee of defendants and fell from a building belonging to them because of their negligence in providing safe means of passage.

Jurisprudencia Codigo Civil, by V. A. M., &c., vol. 3, pp. 62.

And likewise in the case of Canales *vs.* Marianao Railroad Company, decided by the same court May 16, 1893, there was held what is already conceded by our opponents to exist, viz., the right of an injured plaintiff to recover damages for injury to personal chattels.

Ibid., pp. 239, 243.
Official Gazette of Madrid, October 2, 1893, p. 147.

It will be at once noted that the first and second of these references pertain to cases of injury neither to the person nor to real or personal "biens" and involve injuries incapable of exact valuation in money and of more or less indefinite nature, such as the impairment of health, injury to one's business, moral wrongs, the injury to a wife growing out of the negligent killing of her husband, while the third covers damages to property capable of exact definition and ap-

praisement. The courts of France, construing articles 1382 and 1383 of the French Code, which correspond to articles 1902 and 1903 of the Spanish Code, have frequently construed such articles to favor recovery in cases where the damages complained of were of a moral as well as a material nature.

For instance it is said (translation):

The principle established by article 1382 is as general as possible. It receives its application even in the case of an improper exercise of one's rights.

As a matter of principle, every one has a right of action to claim what he may think to be his property or his credit and also a right to defend himself in any suit whatsoever brought against him; but the improper or abusive exercise of both rights constitute an act of malice and *mala fide*, or even a gross fault equivalent to fraud.

The jurisprudence of the courts have been constantly applied in that way.

See decisions of the court of cassation of France of December 24, 1894, February 5, 1894, December 1, 1896, and April 22, 1898, reported at page 959 of "Précis de Droit Civil, by G. Baudry-Lacantinerie, volume 2."

And the same tribunal has also observed:

"La défense en justice est encore un droit dont l'exercice peut dégénérer en faut donnant ouverture à des dommages-intérêts, lorsqu'une demande est repoussée comme ayant été introduite sans aucon intéret legitime et dans un but uniquement vexatoire."

(The exercise of a right of action improperly may give rise to claims for damages if the suit be dismissed upon the ground that it was instituted without lawful interest and with vexatious intent.)

Court of Cassation, France, May 9, 1893; Commentaire Théorique et Pratique du Code Civil, Huc, vol. 8, p. 547.

"Le dommage subi peut être simplement moral, comme dans le cas ou un individu a été porté malgré lui sur une liste des candidats. Celui qui a fait imprimer et distribuer la liste sera passible des juste dommage."

(The damage may be merely a moral one, as in the case where an individual in spite of himself has been named upon a list of candidates (for office). He who prints and distributes the list will be liable for damages.)

Court of Nancy, France, March 8, 1893, Commentaire, etc. (next above), p. 548.

In the days of the "Partidas" the Supreme Court of Madrid, as a necessary concomitant of the action for damages growing out of wrongs, declared that to sustain a recovery in such cases it is necessary that the damage be done through the fault, fraud, or malice of the doer.

Jurisprudencia Civil, Decision No. 329, vol. 37, p. 360.
Ibid, Decision 255, vol. 55, p. 403.

As has perhaps already sufficiently appeared, the right to recover damages for a wrong inflicted upon another is not at all dependent upon the question whether the particular act complained of as causing the damages for which reparation is demanded was punishable by the Criminal Code or not. It is true that in the administration of justice the Spanish code provides for an award of damages in some instances in connection with or as parcel of a criminal proceeding, but this does not in any wise militate against the independent right of action which arises out of acts of omission or commission embracing all degrees of intention, from negligence which occurs without intention to positive acts denominated and defined as crimes.

It is difficult to say whether any act or an omission amounts to a crime or misdemeanor without looking into

the provisions of the Penal Code. An act may be illegal and, nevertheless, not be a crime because the Penal Code does not so nominate it, and, on the contrary, an act may have all the appearance of innocence and, nevertheless, be a crime or misdemeanor because punished by the said Code.

Sometimes an omission occurring through fault or negligence may also amount to a crime or misdemeanor.

The principle "*ubi non est lex nec prævaricatio*" governs in an inquiry as to whether a certain act or omission amounts to a criminal offense.

But in an inquiry as to whether a certain act or omission gives rise to civil responsibility, the substantive law answers for itself.

The language of article 1089 of the Civil Code of Porto Rico "and by illicit acts or omissions, or by those in which any kind of fault or negligence occurs," could not be more comprehensive or clear.

So, where our rights or persons are injured, in any case whatever, we may seek redress through a civil remedy, regardless of a criminal prosecution.

The Penal Code and the Code of Criminal Procedure, instead of being a bar to the exercise of civil remedies, contain many provisions granting the civil remedy in all cases and permitting its exercise before the civil courts according to the civil laws.

Pertinent articles of the Penal Code in force at Porto Rico in 1901 are as follows, viz:

"Art. 16. Every person criminally liable for a crime or misdemeanor is also civilly liable."

"Art. 119. The civil liability established in chapter II, title II, of this book includes: (1) Restitution, (2) reparation of the damage caused, (3) indemnification for losses, (4) enforced manumission."

"Art. 133. Civil liability arising out of crimes or misdemeanors shall be extinguished in the same manner as other obligations in accordance with the rules of civil law."

See also the whole title II, chapter I, Book 1, and title IV, Book 1, of the Penal Code.

The act or omission may fall under the provision of article 1902 of the Civil Code when there is fault or negligence of any kind, or it may pass the limits fixed in such article and fall under the provisions of the Penal Code. In both cases, regardless of whether the act or omission constitutes a public or private criminal offense or whether it is not a criminal offense at all, a civil redress is granted by the Spanish law, and a civil action may be brought in accordance with the provisions of the Civil Code and the Code of Civil Procedure before a court of civil jurisdiction.

If there is a provision of the Penal Code punishing the act or omission which caused the damage, even if it happened through fault and negligence only, then the person injured has two independent remedies which he may exercise in the same action or by separate action; that is to say, he may appeal to the criminal court for the prosecution of the offense and institute a civil action therein, or he may appeal to the civil court asking for damages regardless of the criminal prosecution. If, on the contrary, there is no provision in the Penal Code punishing the act or omission, even if it is illicit, then the person injured has but one remedy, viz., the civil one. Of course, if it is a case of a public criminal offense and the criminal action is going on, he cannot bring separately the civil action until the former has been decided by final sentence.

As bearing upon the above note the following provisions of the Code of Criminal Procedure:

"Art. 3. As a general rule, the jurisdiction of courts charged with penal justice extends to the decisions for the purpose of reprehension only, of the preliminary civil and administrative questions arising in connection with the acts prosecuted, when such questions appear to be so intimately connected with the punishable act that their separation is practically impossible."

"Art. 4. Nevertheless, if the preliminary question be one involving a determination of guilt or innocence, the criminal court shall suspend the proceedings until the decision

thereof by the proper person; but it may fix a period not to exceed two months, within which the parties may apply to the civil or administrative judge or court of competent jurisdiction.

"If said period shall expire without the person interested proving that he has availed himself thereof, the criminal court shall raise the suspension and continue the proceedings.

"The prosecuting official shall be a party to these proceedings."

"Art. 6. If the civil preliminary question shall relate to the right of ownership of real property or of another property right, the criminal court may decide thereon when such rights appear to be based on an authentic title or indubitable acts of possession."

"Art. 7. The criminal court shall conform to the rules of civil or administrative law, respectively, in the preliminary questions which it may be required to decide, in accordance with the preceding articles."

"Art. 100. A criminal action arises from every crime or misdemeanor for the punishment of the culprit, and a civil action may also arise for the restitution of the thing, the repair of the damage, and indemnity for the losses caused by the punishable act."

"Art. 107. The abandonment of the civil action or of a criminal action which can be abandoned shall only prejudice the person who abandons it; the other persons interested in the cause being permitted to continue the criminal action in the state it was, or institute a new one."

"Art. 108. The civil action must be brought jointly with the criminal action by the prosecuting official, whether there be a private accuser or not in the cause; but if the person offended shall expressly renounce his right to restitution, repair or indemnity, the prosecuting official shall confine himself to requesting the punishment of the guilty party." (Note, this governs in cases of "delitos de accion publica.")

"Art. 109. As soon as the declaration of an offended party having the necessary legal capacity has been received, he shall be informed of his rights to become a party to the action and to renounce or not the restitution of the thing, repair of the damage, and indemnity for the loss caused by the punishable act."

* * * * * * *

"Art. 110. Those prejudiced by a crime or misdemeanor who shall not have renounced their rights may enter an appearance in the cause should they do so before the classification of the crime, and exercise the proper civil and criminal actions, or either, as they may desire, without, however, causing any retrogression in the course of the proceedings.

"Even if the persons prejudiced do not enter an appearance in the cause, it shall be not understood that they thereby renounce the right to restitution, repair or indemnity which may be granted them by final sentence, it being necessary that renunciation of this right be made in a proper case in an express and positive manner."

"Art. 111. The actions which arise from a crime or misdemeanor may be instituted jointly or separately; but during the pendency of the criminal action the civil action cannot be brought separately until the former has been decided by a final sentence, excepting always the provisions of articles 4, 5, and 6 of this Code." (Note, this seems to govern in cases of delitos de accion privada.)

"Art. 112. If the criminal action only is instituted, it shall be understood that a civil action may also be brought, unless the person injured or prejudiced renounces the same or expressly reserves the right to institute it after the conclusion of the criminal action, if necessary.

"If only the civil action arising from a crime which can be prosecuted only on a private complaint is instituted, the criminal action shall thereby be considered as extinguished."

"Art. 113. The two actions may be expressly instituted by the same or by different persons; but should the actions derived from a crime or misdemeanor be instituted by two or more persons, they shall do so in one proceeding, and if possible with the same counsel in the discretion of the court."

"Art. 114. If a criminal action is brought to investigate a crime or misdemeanor, a suit cannot be prosecuted in the same; the proceeding being suspended, should any be pending, in the State in which it may be, until final sentence has been pronounced in the criminal case.

"It shall not be necessary for the institution of the criminal action that it shall have been preceded by the civil action arising from the same crime or misdemeanor.

"The provisions of this article shall be understood without

prejudice to those of chapter II, title I, of this book, with reference to preliminary questions."

"Art. 115. A criminal action is extinguished by the death of the culprit; but in such case a civil action still lies against his heirs and successors in right, which can only be brought in a civil court and through civil channels."

"Art. 116. The extinction of the criminal action does not carry with it the extinction of the civil action, unless the extinction be caused by a final sentence declaring that the act on which a civil action might be based did not exist.

"In other cases the person having a right of civil action may institute before the civil jurisdiction, and through the proper civil channels, an action against the person who may be obliged to restore the thing, to repair the damage, or to indemnify the losses suffered."

"Art. 117. Nor does the extinction of the civil action extinguish the criminal action resulting from the same crime or misdemeanor.

"A final judgment absolving from liability rendered in the suit brought by the exercise of the right of civil action, shall not bar the exercise of the proper right of criminal action.

"The provisions of this article are to be understood without prejudice to the provisions of chapter II, title I, of this book and of articles 106, 107, 110, and second paragraph of article 112."

Although there is apparent confusion in the foregoing provisions as to the way and time of instituting the penal and civil actions arising from the acts or omissions complained of, the supreme court of Madrid has removed all the doubts on the subject.

For instance, in a decision rendered on March 23, 1882, the following principle was laid down, to wit:

"Where a person is prejudiced by an act which gives rise to a criminal prosecution he may institute jointly or separately the penal and the civil action arising therefrom; but it shall be presumed that the civil action is instituted jointly with the penal action unless he renounces or expressly reserves the civil action; but if he institutes both actions jointly he ought to be bound by the consequences of the proceeding to which he voluntarily submitted himself and shall

not take advantage afterwards in another proceeding of the civil remedy based upon the same cause of action, because the *res judicata* is a bar thereto."

Reported under number 101 in volume 48, page 394 of the Jurisprudencia Civil.

In its decision of June 14, 1886, the same court said:

"Although the penal responsibility embraces and carries with itself the civil liability arising from the same crime or misdemeanor, and although according to article 111 of the Code of Criminal Procedure the one and the other may be enforced jointly or separately, nevertheless, in order to enforce the civil responsibility it is necessary to observe the laws establishing and regulating the exercise of the civil action."

Reported under number 28, volume 60, page 120.

The reports of the supreme court of Madrid are full of decisions awarding damages in cases arising both from contracts and from acts and omissions occurring through fault and negligence or acts amounting to crimes and misdemeanors. The fact that said court has taken jurisdiction in the latter cases is of itself conclusive of our contention that a civil action arising from an act amounting to a crime or misdemeanor may be instituted before a civil court regardless of the pendency of the criminal prosecution (except in cases above noted), for said supreme court possesses civil jurisdiction alone, as it has frequently proclaimed in its decisions.

For instance, in its decision number 28, volume 60, June 14, 1886 (*supra*), the court said, viz:

"Whereas the infraction of the royal decree of June 20th 1852 governing the cases of smuggling and defraudation cannot authorize the taking of one of the appeals of which this court takes cognizance because, as the said court has always declared, it only deals with civil cases, which are the only matters of which it takes jurisdiction, and the aforesaid royal decree is of a penal tendency and nature."

In dealing with the subject of "civil actions" (Diccionario, &c., &c., Alcubella) the following passage occurs (vol. 1, p. 122):

"Let us consider the principal civil actions:

"CIVIL ACTIONS ARISING FROM CRIMES.—*Every person* criminally liable for a crime or misdemeanor is also civilly liable, says article 18 of the Penal Code (16 of the Code of Porto Rico); it follows from said principle that from *every* crime or misdemeanor arises a civil action on behalf of the prejudiced party to obtain the restitution of the property which was the object of the criminal act, the repair of the damage done or the indemnification of the loss caused."

* * * * * * *

It thus appears that article 1902 of the Civil Code is not the only article under which a person injured may recover damages for wrongs not growing out of contracts, for it is certain that the civil courts have jurisdiction over the civil liabilities arising from malicious acts also.

The words "fault or negligence," as used in article 1902 of the Civil Code, are not synonymous, because "fault" consists not only in omitting to do whatever we are bound to do, but also in the doing of something which we ought not to do, while "negligence" consists in an omission to do what we ought to do.

To be in "fault" is not equivalent to having acted without diligence, because one may be in "fault" for having acted with excess of diligence, as in the case of an adversary.

All the commentators speak of "fault" in contradistinction to "malice," and in case at bar it was affirmed in the declaration that Fernandez, in connection with the attachment proceedings, acted maliciously.

Still, if it should be thought that the acts of Fernandez were such as rendered him liable under the provisions of

the Penal Code, he was none the less liable to civil action in the independent proceeding in the civil courts.

In this connection it should be borne in mind that there are two kinds of "delitos" or crimes known to the Spanish law, viz, "delitos de accion publica," crimes of public action, and "delitos de accion privada," crimes of private action. In the former the public peace and order is involved, and they must be prosecuted, irrespective of the wishes of the party particularly injured or offended, and the proceedings may be commenced without indictment. In the latter the disposition of the party injured is permitted to have play, and in all such cases the proceeding must be based upon an indictment. In the former class of cases the civil demand must be brought in connection with the criminal action, and an acquittal of the crime charged destroys the right to recover in the civil action (Code of Civil Procedure, art. 108); but this is not so with respect to the latter class of cases, for in this class the civil action ought not and, indeed, cannot be brought jointly with the criminal action (articles 111–117, Code Crim. Proced., *supra*), and is not dependent upon its maintenance. This distinction seems not to have been noticed by counsel for plaintiff in error.

That the provincial courts of Spain local to Porto Rico possessed full judicial powers concerning demands for indemnity growing out of malicious acts where the detriment or injury suffered was of a purely moral character—that is, to the person, to the reputation or business standing, or to the feelings—cannot reasonably be doubted.

That such damage or indemnity was generally recoverable in civil actions before the tribunals sitting as civil and not criminal courts seems to be equally clear.

The terms of article 1902 of the Civil Code above discussed are of the most general character and application. Unrestrained by any other provisions, either additional or

special, they would undoubtedly cover a case like the present one. If the local insular courts had jurisdiction of such a cause of action, it cannot be doubted, the requisite citizenship and amount being present, that the district court of the United States for Porto Rico likewise had jurisdiction thereof, for section 34 of the act of Congress of April 12, 1900 (31 Stats., 77), establishing that court, expressly declares that in addition to the ordinary jurisdiction of district courts of the United States it shall have "jurisdiction of all cases cognizant in the circuit courts of the United States," and in all such cases it is required to "proceed therein in the same manner as a circuit court."

As the courts of Porto Rico had judicial power to investigate and determine actions to recover indemnity for damages to persons or property growing out of malicious or negligent acts, it would seem beyond dispute that such actions were also cognizable by the district court of the United States for the district of Porto Rico.

If said district court had jurisdiction to adjudge between the parties as to the subject-matter of this cause, as from the foregoing it appears to have had, then the judgment complained of must be sustained, for it was entirely competent for the parties to waive all questions growing out of or pertaining to the administration of the cause—that is, so far at least as matters of pure procedure are concerned. Apart from the demurrer to the declaration, on the ground that it stated no cause of action against the defendant because the acts of defendant complained of therein thereby appeared to have been committed by him when acting as the duly authorized agent of another (Aguerria), no objection to the course of procedure adopted to try the issues joined appears anywhere in the record.

Counsel for both parties, assuming the trial court to be possessed of requisite jurisdiction to hear and determine the cause, readily acquiesced in a course of procedure which was

entirely familiar to all actively engaged in the conduct of the trial.

But it is said that the right of Perez to recover damages against Fernandez for the wrong complained of could only have been enforced under the local law in and as a part of the original attachment proceeding; that the only remedy open to the former was the presentation of his claim for damages to the judge at the time of final disposition of the attachment. This brings us to the third question propounded by this court, as follows:

Under the law of civil procedure, as existing in Porto Rico at the time of the attachment proceeding complained of, could the damages herein claimed have been allowed or assessed in that proceeding upon the dissolution or discharge of the attachment? If so, was that mode exclusive of every other for ascertaining such damages?

Admitting, for the purposes of argument, that the Spanish law in force in Porto Rico at the time of the levying of the attachment in the case of Aguerria *vs.* Perez made ample provision in cases of wrongful attachment for the assessment of damages *in the attachment proceedings itself* against the plaintiff wrong-doer in favor of the defendant, who suffered loss or injury because thereof (articles 1409–1415 of the Code of Civil Procedure), and that in case of dispute as to the fact of damages or the amount thereof, specifically provided for the method of their ascertainment by articles 927 *et seq.* of the same Code, how does that affect the present case?

Article 1411 of said Code declares that where the attachment is discharged for certain reasons "costs shall be taxed against the *plaintiff, who shall also be adjudged to indemnify*

the defendant for any losses and damages he may have incurred;" and also that where the attachment shall have been vacated for other reasons the ruling thereupon shall also determine what may be proper "with regard to cost and indemnification of losses and damages which may have been suffered."

Article 1415 provides that losses and damages adjudicated *against the plaintiff* in attachment in accordance with the preceding articles shall be recovered "according to the procedure established in articles 927 *et seq.*," and article 1416, which deals with the assessment of costs and damages by the municipal judge in cases of debt of less than 1,000 pesetas (see article 1395), provides that if judgment be rendered for the defendant "all the costs shall be taxed *against the plaintiff*. He shall also adjudge *him* to pay the loss and damages, fixing the amount thereof, if the defendant should have requested it in the action."

Articles 927 *et seq.*, so referred to, cover the cases of assessment of damages as between the judgment creditor and the judgment debtor, parties to the attachment proceedings; articles 928 and 929 provide for the cases where the judgment debtor and judgment creditor agree as to the amount of the losses and damages which have been sustained, and article 930 provides for the case where the debtor shall have impugned the creditor's statement as to amount, it being further provided by article 936 that in such cases "evidence upon the issue shall be taken, should the judge deem it necessary, when any of the parties shall request it."

It is submitted with great deference that these articles of the Code of Civil Procedure have no bearing upon the present case for two reasons:

1st. Because the plaintiff in error, Fernandez, was not a party plaintiff in the attachment proceeding.

2d. Because the United States provisional court for Porto Rico, in which the attachment proceedings were had, was

without judicial power or authority to adjudicate in that case, in conformity with the provisions of the Spanish Code of Civil Procedure, damages against Fernandez.

As has been heretofore suggested, the plaintiff in error, Fernandez, in the present case was not a party, either plaintiff or defendant, in the attachment proceeding. His connection with that case was solely in the guise of an agent or representative of the plaintiff. In procuring the institution of the action he claimed to be authorized so to do by a power of attorney from his principal. Whether his claim in such respect was well founded or whether, in causing the attachment to be levied upon Perez's property, he acted in good faith and upon probable cause are matters of fact with which this court can have no concern. The jury heard the evidence thereabouts and decided the issue against him. If the United States provisional court for Porto Rico, whose jurisdiction Fernandez invoked in behalf of Aguerria, had no power in that proceeding to award, either against Aguerria or any other person acting in his behalf, damages which the defendant may have suffered by reason of the wrongful institution of the cause, it would seem that the right to recover the same in this action under the general provisions of article 1902 of the Civil Code would be beyond question.

The United States provisional court for Porto Rico was established by General Orders No. 88, from which quotations at considerable length will be found at pages 16 and 17 of main brief for defendant in error.

By article II of said General Orders the judiciary power of said provisional court was extended "to all cases which would be properly cognizable by the circuit or district courts of the United States under the Constitution, and to all common-law offenses within the restrictions hereinafter specified."

Article IV thereof is as follows: "The decisions of said

court shall follow the principles of common law and equity as established by the courts of the United States, *and its procedure, rules, and records shall conform as nearly as practicable to those reserved and kept in said Federal courts.*"

Article V declares that "the jury may be introduced or dispensed with in any particular case, in the discretion of the court;" and article VI declares that "the judges of the provisional court shall be clothed with the powers vested in the judges of the circuit or district courts of the United States."

Both Aguerria and Fernandez were subjects of Spain—the former a citizen of Spain, the latter seemingly a resident of Porto Rico. Whatever might have been the regular procedure, so far as the recovery of damages is concerned, had Fernandez, acting for his principal, Aguerria, resorted to the proper insular court in connection with the attachment proceedings against Perez, and however Perez might then have been bound by the forms and methods of procedure provided by the articles of the Code above quoted governing the assessment of costs and damages, it is certain that the methods of procedure so provided neither helped nor hindered the parties to the action in the provisional court, for in the very authority which established that court it was expressly declared that "its procedure, rules, and records shall conform as nearly as practicable to those observed and kept in said Federal courts."

It is certain that there is no procedure known to the circuit and district courts of the United States by which Federal judges sitting therein are required or authorized to determine and assess damages alleged to have been suffered by reason of the wrongful suing out of an attachment, for an attachment proceeding is not a case of equity nor of admiralty nor maritime jurisdiction, and section 648 of the Revised Statutes of the United States, which but restates a provision of the judiciary act of 1789, provides that "the trial of issues of fact in the circuit courts shall be by jury

except in cases of equity and of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy," and except (Sec. 649, R. S. U. S.) "the parties or their attorneys of record waive a jury, in which case issues of fact may be tried by the judge. This is consonant with article VII of the amendments of the Constitution concerning the preservation of the right of jury trial in civil causes where the amount in dispute exceeds $20.

By the act of April 12, 1900, the provisional court above referred to was abolished, and the district court of the United States for the district of Porto Rico was declared to be its successor and authorized to "take possession of all records of that court and take jurisdiction of all cases and proceedings pending therein."

Section VIII of said act of April 12, 1900, provides that the laws and ordinances of Porto Rico in force shall continue except as "altered or modified by military orders and decrees in force when this act shall take effect and so far as the same are not inconsistent or in conflict with the statutory laws of the United States not locally inapplicable."

It is certain that the above quoted provisions of the Revised Statutes of the United States (sections 648, 649) were not locally inapplicable, although they may be and they were certainly inconsistent and in conflict with the method of procedure concerning the determination of issues of fact provided by the Civil Code in so far as the assessment of losses and damages incident to a wrongful attachment is concerned.

Article 914 of the Revised Statutes of the United States, which declares that "the practice, pleadings, and forms of proceeding in civil causes, other than equity and admiralty causes in the circuit and district courts, *shall conform as near as may be*, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or

district courts are held," neither helps the plaintiff in error nor throws any particular light upon the real point here under discussion, for it is well settled that the local law and practice cannot be recognized as a rule of procedure in the courts of the United States where its adoption would be repugnant to the Federal Constitution or impair the effect of any Federal legislation.

Virginia Coupon Cases, 114 U. S., 303.

Luxton *vs.* North River Bridge Co., 147 U. S., 338.

Whenever Congress has legislated upon any matter of practice, and prescribed a rule for the government of its own courts, it is to that extent exclusive of the State legislation on the same subject.

Southern Pac. Co. *vs.* Denton, 146 U. S., 209.

This section (914) has no bearing upon the question of the judicial power of the Federal courts, for their jurisdiction is defined definitely by other statutory provisions. Section 914, if it applies at all to the matter in hand, must be construed in conjunction with sections 918 and 958 of the Revised Statutes, and full effect should be given to each of said sections. Section 914 does not require exact conformity, but only conformity "as near as may be." The circuit courts, subject to the requirement of general conformity and in any manner not inconsistent with any law of the United States or with any rule lawfully prescribed by the Supreme Court, may "regulate their own practice as may be necessary or convenient for the advancement of justice."

If it be true that the Porto Rican procedure required a defendant in attachment proceedings to demand the liquidation of his damages by the trial judge *in that action* on pain of losing all right to indemnification, it is nevertheless true that section 914, Revised Statutes of the United States, does not require any such procedure to be followed in the Federal court for Porto Rico, for to do so would be to deny the

precise regulations of the Federal Constitution and laws governing the trial of issues of fact by jury, except in certain cases of waiver by the parties to the cause. But in any event section 914, Revised Statutes of the United States, has no application to actions of attachment or to cases involving the execution of judgments in common-law causes. In such cases the procedure of the Federal courts is controlled by sections 915 and 916 of the Revised Statutes of the United States, and the Federal courts are thereby authorized "from time to time, by general rules, (to) adopt such State laws as may be in force in the States where they are held in relation to attachment and other process."

It was the intention of Congress to further uniformity "largely through the discretion of the Federal courts, exercised in the form of general rules adopted from time to time."

Shepard *vs.* Adams, 168 U. S., 625.

It may be true that the adoption of the State practice need not be evidenced by rules in writing, but in the absence of a long-continued or established practice and in the face of at least seemingly adverse statutes, some showing should have been made indicating that the Federal court for Porto Rico had adopted *pro hac* the local law and procedure upon which plaintiff in error now relies.

That such adoption had not taken place is evidenced by the lack of objection on the part of plaintiff in error in the trial court; but, if it was necessary so to do, very respectable authority could be vouched for the assertion that a defendant in attachment proceedings is not confined to that action solely for a recovery of his damages in cases where the attachment was not well brought.

For example, José Leach, by agreement and for value, transferred to Doña Maria Clot a drug store established in a certain house.

The owners of the house sued Leach for rent in arrears

and issued a writ of attachment, which was levied upon the drug store and contents. Doña Maria Clot brought her action *en tercería* (replevin) against said Leach and the house owners (plaintiffs in attachment) to recover possession of the property, and at the same time in that action demanded her damages for the wrongful attachment.

The plaintiffs in attachment subsequently dismissed their action to recover their rents, and also dismissed their attachment, but the independent action of Doña Maria Clot in replevin was pressed by her and judgment for the goods rendered in her favor, but she was denied damages because it did not appear in fact that she had suffered any.

On appeal to the supreme court of Spain the judgment of the lower court was affirmed, the supreme court saying:

"Whereas the decision of the lower court setting aside the action for damages is based upon the reason that plaintiff Doña Maria Clot did not prove or even attempt to prove the alleged damages, such reason is sufficient to disregard the motives 2nd and 3rd of the present appeal, because although it is true that he who wrongfully obtains an attachment must make good all of the damages resulting therefrom, it is equally true that it is necessary that a certain damage be done in order that it may be repaired."

Decision of December 16, 1903, "Biblioteca Juridica de la Revista General de Jurisprudence," vol. 96, pp. 909–919.

It will be noted that this case distinctly recognizes the right of the injured party in the case of wrongful attachment to recover damages is a suit other than the attachment proceeding itself, for here the attachment case had been finally disposed of without any reference to damages, which were sought solely in the replevin proceedings, and it is plainly inferable from the decision that had damages been proved judgment would have followed. This case alone would seem to fully meet the reiterated challenge of counsel for plaintiff in error upon this point.

But there is more of interest in this connection.

The Law of Civil Procedure in force in Spain up to the year 1881 and in Porto Rico up to the year 1885, in which the new law was adopted, contains the following provisions regarding provisional seizures, to wit:

"Art. 939. If the attachment is not ratified in the respective suit within twenty days after it having been executed, it shall be null *de jure*, and if in order to prevent the same a surety was given, such surety shall be canceled at the instance of the person who gave the same, or at the instance of the defendant, without any hearing or notice whatever.

"The costs already caused and those which may cause the vacation of the attachment, as well as the costs caused in the execution and cancellation of the surety, shall be adjudged against the plaintiff."

"Art. 940. A person who has secured an attachment shall bring his suit within the precise term of eight days if the owner of the attached property has so requested; failing the plaintiff to so do, the attachment shall be vacated and all the costs, losses and damages shall be adjudged against him."

The foregoing provisions practically correspond with articles 1411 and 1415 of the actual Law of Civil Procedure of Spain and with articles 1409 and 1413 of the law in force in Porto Rico at the time the attachment was sued out, as will appear from the comparative table of both laws printed at pages 1114 to 1120, volume 4, of Alcubilla, "Diccionario de la Administración Española."

Don José Maria Manresa y Navarro (referred to in the brief for plaintiff in error), in his commentaries upon the Spanish Law of Civil Procedure of 1885, at page 253, volume 4, dealing with the above-quoted provisions, speaks as follows (translation):

"In all these cases, when the eight days have elapsed and the suit has not been brought, besides to vacate the attachment, or to give back the amount of money deposited, or to cancel the surety, the plaintiff shall be adjudged to pay not only all the costs but also the losses and damages which

might have suffered his adversary by the provisional seizure. So is expressly order in article 940; and although article 939 has not a similar provision because in paragraph 2 thereof it speaks only of costs, nevertheless, such a provision should be implied, since both articles are identical and the general principles of the law so require. Moreover, article 932 (art. 1400 of the Code of P. R. of 1885) shows that this responsibility is upon plaintiff in the one case as well as in the other. The costs may be demanded at once through the proceedings established by articles 892 and 893, taxing them beforehand in accordance with article 78 *et seq.* But REGARDING THE LOSSES AND DAMAGES, it shall be necessary that the person concerned thereabouts SHALL INSTITUTE THE RESPECTIVE ORDINARY SUIT IN ORDER TO FIX THEIR AMOUNT according to paragraph 2 of article 63 (arts. 927 *et seq.* of the Code of P. R. of 1885), since it is impossible either to determine their amount in a liquidated sum or to establish the basis of liquidation in the kind of decree we are dealing with, which decree must be openly entered without any notice whatever and even without the hearing of the adjudged party."

Is it not certain from this that the contention of plaintiff in error that "losses and damages" must be determined in the attachment proceedings itself or not at all is erroneous? It seems plain, as thus explained, that sections 927 *et seq.* in such case contemplate the institution of a separate suit—an "ordinary action" to recover the damages which he may have suffered, in which the opposite party shall have both notice and an opportunity to be heard.

Under the Spanish codes with respect to the enforcement of certain rights there are two kinds of actions, viz., (1) the general or ordinary action and (2) the special action. The rules respecting the general or ordinary proceeding govern all cases in which special proceedings are not prescribed by law. (See articles 480 *et seq.* of Code of Procedure.)

Articles 1410 and 1411 are rules of summary procedure applicable to the cases therein specified, but they do not

purport to be exclusive or displace the general proceedings prescribed by law for the ordinary declaratory action.

And so it is confidently asserted that damages arising from wrongful attachment, when not fixed upon the dissolution thereof, may be sued for in the ordinary way in the declaratory action and the amount of such damages will be assessed in accordance with the provisions of articles 927 *et seq.* of the Code of Procedure.

Construing provisions of the antecedent legislation corresponding to articles 1410 and 1411, the Supreme Court of Madrid says:

"A provisional seizure having been requested and obtained at the expense and risk of the plaintiff, and said seizure being declared null by a final judgment, the plaintiff must be adjudged to pay the cost, because in the payment thereof the defendants would suffer damage to their interests, and the person who causes an injury is liable for the damages directly caused and also for all the consequences of the wrongful action, according to law 3, title XV, partida 7."

Decisions of November 26, 1857, and April 7, 1868, reported in "Derecho Procesal de España," by Robles Pozo, vol. 2, page 188.

Considering article 1411, in the light of the foregoing, it will appear that the first paragraph thereof is mandatory and that in cases where the attachment has been dissolved, for any of the causes therein recited, none of which apply to the pending case, it is the duty of the judge to assess immediately the damages in that case; but where the attachment is dissolved under the second paragraph, "for any other cause," as here, the provisions with respect to damage appearing in that paragraph are directory merely, and the judge may or may not decide in that case, with respect to damages, "what may be proper."

In this connection and as bearing upon this question by

way of analogy at least, the following decisions of the Supreme Court of Madrid are interesting:

Jurisprudencia Civil, Decision No. 303 of July 6, 1885, volume 58, p. 265;

Ibid, Decision No. 235 of July 21, 1893, volume 73, p. 954.

The mere absence of decisions by the Supreme Court of Madrid upon a particular point of civil law would denote nothing as to the meaning or applicability of said law. In civil jurisprudence decisions occupy a different position and different relation to the body of the law than they do in countries wherein the common law prevails. The lesser importance of decisions in the former case is evidenced by the lack of indexes and digests by which they may be readily identified in connection with any disputed principle or article of the Code.

Much more might well be found by further search, but it could only serve to extend the covers of this brief, for, as above suggested, the defendant (plaintiff in error) here, whose malicious acts caused the injury for which damages are sought, was not a party in the attachment proceedings, nor was the attachment vacated for any of the reasons nor in any of the modes prescribed by the first paragraph of article 1411 of the Code of Procedure, but, on the contrary, the further prosecution of the attachment proceedings, which had been brought in the Federal provisional court under its rules of procedure, was stayed by the writ of injunction issuing out of the district court for Porto Rico, the successor under Federal law of the former court, which writ of injunction was issued at the instance of a stranger to both of the parties to the attachment suit.

As Fernandez was not a party to the record in the attachment suit, to hold that Perez was limited to that action for his relief would be to hold that he was totally without

remedy as against Fernandez, who personally by his malicious acts had wrought the damages of which Perez complained.

So far as anything to the contrary appears from this record, the plaintiff, Aguerria, in the attachment proceedings may have been a myth, or if he lived his name may have been used by Fernandez in that proceeding without authority, and merely as a means of wreaking malice or venting his spleen.

Fernandez by his malicious acts wrought a wrong and injury to Perez. Under the Spanish Civil Code he was bound to repair it. The district court for Porto Rico, having concurrent jurisdiction of the subject-matter with the local courts of Porto Rico, had jurisdiction to administer this cause by reason of the citizenship of the parties. No error appears upon the face of the record and none has been preserved by the bill of exceptions. The judgment of the district court for Porto Rico should be affirmed.

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